UNITED MERCHANT FINANCE BHD

v.

DIAMOND PEAK SDN BHD

HIGH COURT MALAYA, PULAU PINANG
JEFFREY TAN J
[ORIGINATING SUMMONS NO: 24(31)-258-1986]
10 AUGUST 1999

LAND LAW: *Charge - Order for sale - Setting aside - Auction date not stated in order - Second order obtained specifying auction date - Whether in contravention of s. 257(1)(a) - (d) of National Land Code 1965 - Whether orders a nullity - Whether court functus officio after granting first order - Whether order ought to be set aside ex debito justitiae*

CIVIL PROCEDURE: *Judgments and orders - Setting aside - Ex debito justitiae - Principles applicable - When may one High Court set aside order of another High Court - Auction date in order for sale only specified in second order - Whether in contravention of s. 257(1)(a) - (d) of National Land Code 1965 - Whether orders a nullity - Whether court functus officio after granting first order - Whether order ought to be set aside ex debito justitiae - Whether delay in applying to set aside militates against applicant*

This was an application by the defendant to set aside an order for sale dated 22 September 1986 in respect of the defendant's lands which were charged to the plaintiff as security for a loan. As the said order for sale did not specify the date of the auction sale, another order dated 16 August 1988 was pronounced by the court specifying the auction date. No appeals were filed against these orders. In support of this application, counsel for the defendant contended that (i) there had been non-compliance with O. 83 r. 3(3)(c) read together with r. 3(6) of the Rules of the High Court 1980 ('RHC'); (ii) the order dated 22 September 1986 contravened s. 257(1)(a) – (d) of the National Land Code 1965 ('NLC') as it did not specify an auction date; (iii) the Court after making the first order was *functus officio* and could not amend the same; (iv) an irregular judgment may be set aside *ex debito justitiae*; and (v) a court had the inherent jurisdiction to set aside its own order.

In opposing the defendant's contentions, the plaintiff submitted that the order dated 16 August 1988 was not a corrective order but a supplemental order specifying the auction date as required by s. 257 of the NLC and Practice Note No. 2 of 1987. Accordingly, the plaintiff submitted that there was no prejudice to the defendant and no nullity. Further, counsel for the plaintiff argued that the defendant could not be allowed to review a final order and

thus the present application was an abuse of the process of court as the court was *functus officio*. It was stressed that the objections of the defendant ought to have been raised at the stage of the hearing of the application for the order for sale. In reply, the defendant contended that the doctrines of *res judicata* and *functus officio* do not apply in the case of a nullity such as the present case.

Held:

[1] The charge action here was not an action for the delivery of possession or payments of moneys secured or both. Rather, it was an order for sale of the charged property, an altogether dissimilar and distinct relief not regulated by O. 83 rr. 2 and 3 of the RHC. Therefore, it ought not to have been contended that O. 83 r. 3(3)(c) read together with r. 3(6) of the RHC was not followed.

[2] The order dated 16 August 1988 was to supplement the order dated 22 September 1986, that is to specify the auction date not specified in the earlier order. It was certainly not an order standing on its own. It was a supplemental order to be read together with the order for sale. Side by side, the two orders fulfilled all mandatory requirements of s. 257 of the NLC.

[2a] It would not be fair to punish the plaintiff for the omission to specify the auction date in the order dated 22 September 1986 when considering that (i) the plaintiff had attended to that omission and the court had ultimately specified the auction date; (ii) the defendant had let things slide and not raise the issue for all these years; and (iii) the defendant had not appealed against any of the orders which ought to be final, binding and conclusive on the parties *inter se*.

[3] One High Court cannot set aside a final order regularly obtained from another High Court of concurrent jurisdiction. However, a person affected by an order which could be proved to be null and void on the ground of irregularity or lack of jurisdiction is entitled to apply to have it set aside *ex debito justitiae* without the need to have recourse to the rules that deal expressly with proceedings to set aside orders for irregularity. Courts have not closed the door to the type of defects in the final judgment that can be brought into the category that attracts *ex debito justitiae*. The general rule is that the order must be a nullity. Apart from a breach of rules of natural justice, the contravention of any written law should be one which defies a substantive statutory prohibition so as to render the defective order null and void on the ground of illegality or lack of jurisdiction. It should not be applied to

a defect in a final order which has contravened a procedural requirement of any written law. The discretion to invoke the inherent jurisdiction should be exercised judicially in exceptional cases where the defect is of such a serious nature that there is a real need to set aside the defective order to enable the court to do justice.

[3a] Apart from the exception as stated, once a judge makes a ruling, substantive or procedural, final or interlocutory, it must be adhered to so that there is certainty and finality to judgments and orders. A ruling may only be reopened if it is demonstrated that it is a nullity and provided that the judgment or order in question has not been drawn up and perfected. In other cases, the appeal procedure should be adopted to set aside a defective order.

[3b] In this case, all that the defendant could show was that the order dated 22 September 1986 failed to specify the auction date which was an omission to exercise jurisdiction on a non-substantive matter consequential to the order for sale. The objection was undoubtedly technical. At best, the order for sale not specifying the auction date was an irregularity that contravened a procedural requirement. The fact that the mandatory requirements of s. 257 of the NLC were only met by two composite orders went only to form and not substance. The quintessence of s. 257 of the NLC had been complied with. Clearly there was no reason to set aside the order for sale *ex debito justitiae*.

[4] Rather than being *functus officio*, the learned judge retained that control over the order for sale, so there would be proper and complete administration of justice, until the auction date was specified. It was well within the inherent jurisdiction of the court to put right the omission, but without transforming the order for sale, by an adjunct order. The court was only doing what it should have and would have done in the first place. Moreover, no conceivable prejudice would be suffered thereby by the defendant.

[5] Delay militates against the right to have a judgment or order set aside *ex debito justitiae*. *Prima facie*, the delay in the instant case – almost 11 years to file this application – was almost contemptible. Yet there was no explanation forthcoming from the defendant. Even if the order for sale dated 22 September 1986 could be set aside *ex debito justitiae*, relief would be refused to this criminally indolent defendant.

[Application dismissed with costs.]

Case(s) referred to:

Badiaddin Mohd Mahidin & Anor v. Arab Malaysia Finance Bhd [1998] 2 CLJ 75 ***(refd)***

Ban Huat Seng Co Ltd v. Lee Poh Soo [1967] 1 MLJ 145 ***(foll)***

Citi Bank v. Ibrahim Othman [1994] 1 MLJ 608 ***(refd)***

Fira Development Sdn Bhd v. Goldwin Sdn Bhd [1989] 1 MLJ 40 ***(refd)***

Hartecon JV Sdn Bhd & Anor v. Hartela Contractors Ltd [1997] 2 CLJ 104 ***(refd)***

Hock Hua Bank Bhd v. Sahari Murid [1981] 1 MLJ 143 ***(refd)***

Ling Nam Rubber Works v. Leong See & Co (No 2) [1968] 1 MLJ 265 ***(refd)***

Khor Cheng Wah v. Sungai Way Leasing Sdn Bhd [1997] 1 CLJ 396 ***(foll)***

Maimunah Megat Montak v. Mayban Finance Bhd [1996] 3 CLJ 9 ***(dist)***

Perwira Affin Bank Bhd v. Tan Tian Ser [1995] 2 CLJ 133 ***(refd)***

Stephenson v. Garnett [1898] 1 QBD 677 ***(refd)***

Sykt Perkhidmatan Bas Sibuga Sdn Bhd v. Sykt Bas Jalan Leila Sdn Bhd [1997] 3 CLJ 614 ***(refd)***

Tuan Hj Ahmed Abdul Rahman v. Arab-Malaysian Finance Bhd [1996] 1 MLJ 30 ***(refd)***

United Oriental Assurance Sdn Bhd v. Ng King See [1987] 2 MLJ 264 ***(refd)***

Legislation referred to:

National Land Code 1965, s. 257(1)

Rules of the High Court 1980, O. 83 rr. 1, 2, 3

For the plaintiff - Toh Lee Hong; M/s Kek Ooi & Lee Hong

For the defendant - Mahinder Singh (Harjit Singh with him); M/s Harjit Singh Sangay & Co

Reported by Cindy Chan

JUDGMENT

Jeffrey Tan J:

This is the defendant's application, by summons-in-chambers dated 3 April 1997 (encl. 77), to set aside the Order dated 22 September 1986 ordering the public auction of lands known held Daftar Sementara Pegangan Pegangan No. 514 and 522, and Perakuan Pendahuluan Mengenai Hakmilik Pegangan Pegangan No. 521 and 538, all in Mukim 2, Daerah Barat Daya charged by the defendant to the plaintiff as security for a loan of RM1,600,000, to recover the outstanding sum (RM2,018,860.61) due and owing by the defendant to the plaintiff as at the date of the order dated 22 September 1986.

It is not in dispute that the order for sale dated 22 September 1986 was made after an *inter partes* hearing, that the auction date was specified by order dated 16 August 1988, and that there were no appeals against the orders dated 22 September 1986 and 16 August 1988. Reasonably, those Orders must be final, binding and conclusive, or are they not, on the parties *inter se*.

For the defendant, Mr Mahinder Singh contended that O. 83 r. 3(3)(c) of the Rules of the High Court 1980 read together with O. 83 r. 3(6) was not followed, and that the Order dated 22 September 1986 "contravened" s. 257(1)(a-d) of the National Land Code (Act 56 of 1965), which provisions, he said, are mandatory and cannot be waived or contracted out. He further said that an order in breach of any written law will be set aside, that an irregular judgment may be set aside *ex debito justitiae,* and that a court has the inherent jurisdiction to set aside its own order. Then Mr Mahinder related that the order dated 22 September 1986 failed to specify the auction date.

For the plaintiff, Miss Toh Lee Hong responded as follows. The affidavit (encl. 3) "might not have given an updated account", but a further affidavit (encl. 11) updated the account till 22 September 1986 – the date on which the order for sale was made. On 16 August 1988, the judge who ordered the auction sale (Dzaiddin J, as he then was) specified the auction date (20 January 1989). Section 257 of the NLC was effectively observed. The objections of the defendant ought to have been raised at the stage of the hearing of the application for the order for sale. Now it is too late for the defendant to raise the present objections. The defendant cannot be allowed to review a final order. Enclosure 77 is an abuse of the process of court. The Court is *functus officio*. Mr Mahinder replied that the doctrines of *res judicata* and *functus officio* do not apply in the case of a nullity.

Normally, submissions would have been concluded after the reply, but Mr Mahinder submitted further, without complaint from Miss Toh, as follows.

The Order dated 16 August 1988 was bad as the court after making the order dated 22 September 1986 was *functus officio*. The court could not "amend" the order dated 22 September 1986. The Order dated 16 August 1988 was afflicted by another defect – it ought to have addressed the other mandatory provisions of s. 257. It ought also to have incorporated the terms of the order dated 22 September 1986. If the order dated 22 September 1986 could not be cured by the slip rule, then it also could not be cured by the order dated 16 August 1988.

That further submission prompted Miss Toh to respond further as follows. The order dated 16 August 1988 was not a corrective order, but a supplemental order on the auction date, as required by s. 257 of the NLC and Practice Note No 2 of 87. No prejudice was suffered by the defendant. There is no nullity. There are no incurable defects.

Section 257 of the NLC that Mr Mahinder contended was "contravened" reads as follows.

(1) Even order for sale made by the Court under section 256 shall:

(a) provide for the sale to be by public auction;

(b) require the sale to be held on, or as soon as may be after, a date specified therein, being a date not less than one month after the date on which the order is made;

(c) specify the total amount due to the chargee at the date on which the order is made is made; and

(d) require the Registrar of the Court to fix a reserve price for the purpose of the sale, being a price equal to the estimated market value of the land or lease in question.

And O. 83 r. 3(3)(c), 3(6) of the RHC, read as follows.

3(3) Where the plaintiff claims delivery of possession the affidavit must show the circumstances under which the right to possession arises and, except where the Court in any case or class otherwise directs, the state of the account between the chargor and chargee with particulars of -

(c) the amount of the interest or installments in arrear at the date of issue of the originating summons and at the date of the affidavit.

3(6) where the plaintiff claims payment of moneys secured by the charge, the affidavit must prove that the money is due and payable and give the particulars mentioned in paragraph (3)

Order 83 applies to an action by a chargee or chargor or by any person having the right to foreclose or redeem any charge, being an action in which there is a claim for any of the following reliefs namely, (a) payment of moneys secured by the charge; (b) sale of the charge property; (c) foreclosure; (d) delivery of possession to the chargee by the chargor or by any other person who is or is alleged to be in possession of the property; (e) redemption; (f) reconveyance of the property or its release from the security; (g) delivery of possession by the chargee. But O. 83 does not apply wholesale to an action in which there is a claim for any of those seven reliefs. Rule 2 applies where in a charge action begun by originating summons, being an action in which the plaintiff is the chargee and claims delivery of possession or payments of moneys secured or both, "the defendant fails to enter an appearance" – see O. 83 r. 2(1). And r. 3 applies to a charge action begun by originating summons in which the plaintiff is the chargee and claims delivery of possession or payments of moneys secured or both – see O. 83 r. 3(1).

In the present case, the charge action begun by originating summons was not an action for the delivery of possession or payments of moneys secured or both. It was an action for an order for the sale of the charged property, an altogether dissimilar and distinct relief not regulated by rr. 2 and 3 – see O. 83 r. 1(4). Then, it ought not to have been contended that O. 83 r. 3(3)(c) read together with r. 3(6) was not followed. Indeed, even if O. 83 rr. 3(3)(c) and 3(6) regulated the instant charge action (*ie*, if *Citi Bank v. Ibrahim bin Othman* [1994] 1 MLJ 608 is truly to be preferred over *Perwira Affin Bank Berhad v. Tan Tian Ser* [1995] 2 CLJ 133), it ought not to have been so contended, as the affidavits clearly showed the amount of the interest in arrears (in the instant case of a fixed loan repayable on demand, the amount of instalments in arrears was not applicable) at the date of the affidavits, and at the date on which the order for sale was made. Ineluctably, the plaintiff stated the exact amount that the defendant was legally liable to pay to stave off the sought auction sale.

The charge that s. 257(1) (a-d) was "contravened", in that it was contended that the entire provisions of s. 257 was "contravened", was also indiscriminate. For how could it be denied that the order for sale dated 22 September 1986 provided for the sale to be by public auction, required the sale to be held on a date not less than one month after the date on which the order for sale was made, specified the total amount due to the chargee at the date on which the order was made (RM2,018,860.61) as well as required the registrar of the Court to fix a reserve price for the purpose of the sale and give all necessary and consequential directions for the purpose of the sale.

It is fact though that the order for sale dated 22 September 1986 failed to specify the date of the auction sale. In *Maimunah bte Megat Montak v. Mayban Finance Berhad* [1996] 3 CLJ 9, the Federal Court held that the provisions of s. 257 of the NLC were mandatory and "as the order of sale in the present case had suffered from the defects hereinbefore mentioned [the failure to specify the auction date and the failure to stipulate the actual amount due under the charge] it was therefore invalidated". But that auction date was specified, albeit by another order dated 16 August 1988. And that order dated 16 August 1988 spelt out that "the auction is fixed on 20 January 1989 pursuant to the Order of This Honourable Court for the sale of the abovenamed properties made 22 September 1986". Obviously, that order dated 16 August 1988 was to supplement the order dated 22 September 1986 – specify the auction date not specified in the earlier order. It was certainly not an order standing on its own. It was a supplemental order, to be read together with the order for sale. Side by side, those two orders fulfilled all mandatory requirements of s. 257 of the NLC, but only because there were two orders and not if there was only one. Throwing light upon that 2nd order, Miss Toh explained that it was required by s. 257 of the NLC, and by Practice Note No 2 of 87 which reads as follows.

Practice Note No 2 of 1987

Order for sale under the National Land Code 1965

It has been brought to the attention of the Honourable the Chief Justice Malaya that a practice existed in some High Courts for the senior assistant registrar instead of the judge to make orders for sale of land/lease and deal with matters consequential thereto. Such a practice is contrary to section 257 of the National Land Code 1965.

2. The Honourable Chief Justice Malaya thereby directs that henceforth the practice shall be for the Judge of the High Court to make the orders as prescribed in paragraphs (a), (b) and (c) of subsection (1) of section 257; the order for sale shall provide for it to be held by public auction on a date to be specified therein being a date not less than one month after the date of the order with the total amount due to the chargee as at the date of the order duly stated. The Judge shall also make an order that the reserve price and other directions with respect to the sale be made by the senior assistant registrar.

[3 In the event a new date of sale is required to be fixed, the same shall be dealt with by the Judge himself.]

(Notes – Paragraph 3 within square brackets was repealed by Practice Note No 5 of 1989.)

To set right an obvious misconception, it is not Practice Note No 2 of 1987 (which is no more than echoes the law) but s. 257 of the NLC that requires the judge of the High Court, *inter alia*, to specify the auction date. Nevertheless, Practice Note No 2 of 1987 spotlighted and so acknowledged the practice that existed in some High Courts for the senior assistant registrar instead of the judge to make orders for sale of land/lease and deal with matters consequential thereto. Given that practice in some High Courts prior to Practice Note No 2 of 87, would it be fair therefore to punish the plaintiff for the omission to specify the auction date in the order dated 22 September 1986 that could not have been the plaintiff's? Especially so as the plaintiff had attended to that omission, and the court had ultimately specified the auction date. Especially so as the defendant had let things slide and not raised issue or controversy for all these years. And especially so as the defendant had not appealed against any of those orders, which ought to be final, binding and conclusive on the parties *inter se*.

On one court setting aside the order of another court of concurrent jurisdiction, it is well-suited to refer to *Badiaddin bin Mohd Mahidin & Anor v. Arab Malaysia Finance Bhd* [1998] 2 CLJ 75. There, the appellants were the registered co-proprietors of a piece of Malay reservation land charged to the respondent as security for an advance to a third party. Upon breach of the

loan agreement, the respondent obtained an order for sale of the said land. The appellant applied for a declaration that the charge as well as the order for sale were invalid as being in contravention of the Malay Reservations Enactment (FMS Cap 142). On 21 March 1988, the High Court granted the declaration and ordered the appellant, the latter upon the respondent's application, to repay all monies lent; there was no appeal against that order. On 8 October 1990, the High Court granted a further order declaring that the appellant had received an advantage and ordered the sale of the said land; the appeal against that order was struck out.

The appellant commenced proceedings afresh to have the order of 8 October 1990 declared null and void and to have it set aside on the ground that it contravened the Malay Reservation Enactment. The appellant argued that they were entitled to the remedy *ex debito justitiae* without the need to comply with the appeal procedure. The respondent argued that *res judicata* and estoppel precluded the appellant from questioning the validity of the order of 8 October 1990. Mohd Noor Abdullah J held that it would be unjust to estop the appellants from challenging the order of 8 October 1990 by reference to *res judicata* or to any other branch of the doctrine of estoppel, as the order of 8 October 1990 was plainly invalid. On appeal, the Court of Appeal held that the High Court was *functus officio* and had no jurisdiction whatsoever to set aside the order of 8 October 1990, regardless of any illegality in the order.

However, allowing the appeal and restoring the order of Mohd Noor Abdullah J, the Federal Court held that the High Court has the necessary inherent jurisdiction quite unaffected by the doctrine of *functus officio* to set aside a final judgment of another High Court that could be proved to be null and void on ground of illegality or lack of jurisdiction and that a person affected by the order is entitled to apply to have the order set aside without the need to have any recourse to the rules that deal expressly with proceedings to set aside orders for irregularity.

At p. 409, Mohd Azmi FCJ, with him Eusoff Chin CJ Federal Court and Wan Adnan FCJ (as he then was), spelt out the special exception to the rule that one High Court cannot set aside a final order regularly obtained from another High Court of concurrent jurisdiction, as follows:

> It is of course settled law as laid down by the Federal Court in *Hock Hua Bank's* case that one High Court cannot set aside a final order regularly obtained from another High Court of concurrent jurisdiction. But one special exception to this rule (which was not in issue and therefore not discussed in *Hock Hua Bank*) is where the final judgment of the High Court could be proved to be null and void on ground of irregularity or lack of jurisdiction so as to bring the aggrieved party within the principle laid down by a number of

authorities culminating in the Privy Council case of *Isaacs v. Robertson* [1985] AC 97 where Lord Diplock while rejecting the legal aspect of voidness and voidability in the orders made by a court of unlimited jurisdiction, upheld the existence of a category of orders of the court '... which a person affected by the order is entitled to apply to have set aside *ex debito justitiae* in the exercise of the inherent jurisdiction of the court, without his needing to have recourse to the rules that deal expressly with proceedings to set aside orders for irregularity, and to give to the judge a discretion as to the order he will make'

The Privy Council through Lord Diplock also emphasized that the courts in England have not closed the door as to the type of defects in the final judgment that can be brought into the category that attracts *ex debito justitiae* the right to have it set aside without going into the appeal procedure, 'save that specifically it includes orders that have been obtained in breach of rules of natural justice'. Similarly in this country, the statement of Abdoolcader J (as he then was) in *Eu Finance Bhd. v. Lim Yoke Foo* [1982] 2 MLJ 37 at p. 39 provides the correct guideline on the subject:

> The general rule is that where an order is a nullity, an appeal is somewhat useless as despite any decision on appeal, such an order can be successfully attacked in collateral proceedings; it can be disregarded and impeached in any proceedings, before any court or tribunal and whenever it is relied upon – in other words, it is subject to collateral attack. In collateral proceedings, the court may declare an act that purports to bind to be non-existent. In *Harkness v. Bells' Asbestos and Engineering Ltd* [1967] 2 QB 729, Lord Diplock (now a Law Lord) said (at p. 736) that 'it has been long laid down that where an order is a nullity, the person whom the order purports to affect has the option either of ignoring it or going to the court and asking for it to be set aside.

For my part, I must hasten to add that apart from breach of rules of natural justice, in any attempt to widen the door of the inherent jurisdiction of the superior courts to set aside an order of court *ex debito justitiae* to a category of cases involving orders which contravened 'any written law', the contravention should be one which [defies] a substantive statutory prohibition so as to render the defective order null and void on ground of illegality or lack of jurisdiction. It should not for instance be applied to a defect in a final order which has contravened a procedural requirement of any written law. The discretion to invoke the inherent jurisdiction should also be exercised judicially in exceptional cases where the defect is of such a serious nature that there is a real need to set aside the defective order to enable the court to do justice. In all cases, the normal appeal procedure should be adopted to set aside a defective order, unless the aggrieved party could bring himself within the special exception.

Gopal Sri Ram JCA held as well that an order of a court of unlimited jurisdiction made without jurisdiction may be declared void and set aside, and that a court of unlimited jurisdiction, even in the absence of an express enabling jurisdiction, has inherent power to set aside its orders made in breach of written law.

> If as held ... there is no power in a court to set aside its orders, though made in contravention of the express provisions of a statute, then, I must fold my arms in abject submission, allow the orders to stand and let the illegality persist. But I do not perceive the law to intend such a result. It is true as a general rule, that orders of a court of unlimited jurisdiction may not be impugned on the ground that they are void in the sense that they may be ignored or disobeyed ...
>
> It is one thing to say that an order of a court of unlimited jurisdiction must be obeyed until it is set aside. It is quite a different thing to say that a court of unlimited jurisdiction may made orders in breach of written law ... I take it to be well settled that even courts of unlimited jurisdiction have no authority to act in contravention of written law. Of course, so long as an order of a court of unlimited jurisdiction stands, irregular though it may be, it must be respected. But where an order of such a court is made in breach of statute, it is made without jurisdiction and may therefore be declared void and set aside in proceedings brought for that purpose. It is then entirely open to the court, upon the illegality being clearly shown, to grant a declaration to the effect that the order is invalid and to have it set aside. It is wrong to assume that such an order may only be corrected on appeal.

Peh Swee Chin FCJ allowed the appeal on different grounds. Nevertheless, pertinent to this setting aside application, his Lordship had this to say of a final judgment.

> When a judgment in the High Court has been perfected ... a party to the judgment ... cannot reopen the matter finalized in the judgment by seeking to alter it or amend it for the court would be *functus officio* by virtue of the ratio of *Hock Hua Bank v. Sahari bin Murid*. Once perfected, a judgment of the High Court is also entitled to the obedience and respect from the parties to it on the basis of a command from a superior court of unlimited civil jurisdiction in the course of contentious litigation.

In *Hartecon JV Sdn Bhd & Anor v. Hartela Contractors Ltd* [1997] 2 CLJ 104; [1996] 2 MLJ 57, where the High Court reopened its earlier procedural ruling, heard arguments afresh and reversed its earlier ruling, and where it was argued, on appeal, that it was well within the powers of the judge to alter the judgment at any time before it was entered and perfected, the Court of Appeal per Gopal Sri Ram JCA stated the circumstances under which a court may amend or alter its own order.

> ... once a judge makes a ruling, substantive or procedural, final or interlocutory, it must be adhered to and may not be reopened willy-nilly. One may then ask: how is this approach to be reconciled with the decision in *Harrison*? The answer to that question lies in recognizing that the principle for which that case is authority applies only where it is demonstrated that the court plainly lacked jurisdiction to make the order complained of: provided, of course, that the order in question has not been drawn up and perfected. To extend the scope of that principle would be to effectively demolish the requirements of certainty and finality which are the two pillars on which the judicial process rests.

Clearly, one High Court cannot set aside a final order regularly obtained from another High Court of concurrent jurisdiction (*Hock Hua Bank Bhd v. Sahari bin Murid* [1981] 1 MLJ 143). Except that a person affected by an order which could be proved to be null and void on ground of irregularity or lack of jurisdiction *(Badiaddin)* is entitled to apply to have set aside *ex debito justitiae* without his needing to have recourse to the rules that deal expressly with proceedings to set aside orders for irregularity. Courts have not closed the door to the type of defects in the final judgment that can be brought into the category that attracts *ex debito justitiae* the right to have it set aside without going into the appeal procedure. The general rule is that the order must be a nullity. Apart from a breach of rules of natural justice, the contravention of any written law should be one which defies a substantive statutory prohibition so as to render the defective order null and void on ground of illegality or lack of jurisdiction. It should not be applied to a defect in a final order which has contravened a procedural requirement of any written law *(Badiaddin).* The discretion to invoke the inherent jurisdiction should be exercised judicially in exceptional cases where the defect is of such a serious nature that there is a real need to set aside the defective order to enable the court to do justice.

Otherwise, once a judge makes a ruling, substantive or procedural, final or interlocutory, it must be adhered to, so there is certainty and finality to judgments and orders, and may only be reopened if it is demonstrated that the judgment is a nullity and provided that the order in question has not been drawn up and perfected. In other cases, the appeal procedure should be adopted to set aside a defective order.

In the instant case, there was a proper *litis contestatio* and a final adjudication between the parties to it on the merits. There were no appeals against any one of those two orders. Just this application to set aside the order of another court of concurrent jurisdiction. The defendant must show, so to be entitled to have set aside *ex debito justitiae*, for fine words butter no parsnips, that the court plainly lacked jurisdiction to make the order dated 22 September 1986 or that the order dated 22 September 1986 defied a substantive statutory prohibition or written law.

But all that the defendant could show was that the order dated 22 September 1986 failed to specify the auction date. Other than that, it was not shown at all that the court plainly lacked jurisdiction, which the court obviously did not lack, to make the order dated 22 September 1986, or that the order dated 22 September 1986 defied, which the order obviously did not defy, a substantive statutory prohibition or written law. Indeed, but for the omission to specify the auction date, all terms of the order dated 22 September 1986 observed strictly the provisions of s. 257 of the NLC. It was never the case of the court lacking jurisdiction to make the order dated 22 September 1986 nor of the order dated 22 September 1986 defying a substantive statutory prohibition or written law. It was just the case of the court omitting to exercise jurisdiction, not on a matter of substantive rights but on a non-substantive matter consequential to the order for sale. It was a glitch, an accidental slip made heavy weather of by the defendant. As Richard Malanjum J observed in *Syarikat Perkhidmatan Bas Sibuga Sdn. Bhd. v. Sykt Bas Jalan Leila Sdn. Bhd.* [1997] 3 CLJ 614, a *per incuriam* decision is not a nullity *per se*.

And rather than *functus officio*, the learned judge retained that control over the order for sale, so there would be proper and complete administration of justice, until the auction date was specified (for an analogy, see *Ling Nam Rubber Works v. Leong See & Co. (No. 2)* [1968] 1 MLJ 265). For it was well within the inherent jurisdiction of the court holding the scales to put right the omission, but without transforming the order for sale, by an adjunct order. After all, the court was only doing what it should have and would have done in the first place. Moreover, was it not the case, that no conceivable prejudice would be suffered thereby by the defendant.

The objection is undoubtedly technical. At best, the alleged defect – the order for sale not specifying the auction date – was an irregularity that contravened a procedural requirement. How could that procedural irregularity have been corrected? In his submission, Mr Mahinder proffered this novel solution – "... The court could not amend the order dated 22 September 1986. The Order dated 16 August 1988 ought to have addressed the other mandatory provisions of s. 257. It ought also to have incorporated the terms of the order dated 22 September 1986". With respect, that could not have been the case, as the court having addressed "the other mandatory provisions of s. 257" on 22 September 1986 could not be addressing those "other provisions" again on 16 August 1988, as the court, with regard to those "other provisions", was then *functus officio.* And it could not have been the case as well of the court "incorporating the terms of the order dated 22 September 1986" on 16 August 1988, as the terms of the order dated 22 September 1986 were made on 22 September 1986, after a proper *litis contestatio* on 22 September 1986 and not 16 August 1988.

Fairly said, the adjunct order was the just solution to the omission, so to give effect to the order for sale and do essential justice. Unlike *Maimunah* where the order of sale failed not just to specify the auction date but also failed to stipulate the actual amount due under the charge, the present order for sale merely failed to specify the auction date that in the event was later specified by an adjunct order. The fact that the mandatory requirements of s. 257 were only met by the composite of two orders went only to form and not substance. It took nothing away from the fact that the quintessence of s. 257 had been complied.

Clearly, there is no show of reason to set aside the order for sale *ex debito justitiae*. There is only reason and more to dismiss this (captious) application.

In *Khor Cheng Wah v. Sungai Way Leasing Sdn. Bhd* [1997] 1 CLJ 396; [1996] 1 MLJ 223, Gopal Sri Ram JCA firmly enunciated as follows.

> It is a cardinal principle of law, that when a litigant seeks the intervention of the court in a matter that affects his rights, he must do so timeously. The maxim, *vigilantibus, non dormientibus, jura subveniunt,* though having its origins in the Court of Chancery, is of universal application. Even in cases where a right is exercisable *ex debito justitiae,* a court may refuse relief to an indolent litigant.
>
> In all cases in which delay in approaching the court is in issue, the burden is upon the litigant who has delayed to render a satisfactory explanation for it. Whether the explanation in a given case is satisfactory or reasonable depends upon the facts and circumstances of each case ...

His Lordship then quoted the following dictum of Edgar Joseph Jr FCJ in *Tuan Haji Ahmed Abdul Rahman v. Arab-Malaysian Finance Berhad* [1996] 1 MLJ 30.

> The general rule is that when it is clearly demonstrated to the satisfaction of the court that a judgment has not been regularly obtained, the defendant is entitled to have it set aside *ex debito justitiae*, that is to say, irrespective of the merits and without terms. Having said that it should be added that the application to set aside such a judgment should be made
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> (a) with reasonable promptitude, in other words within a reasonable time and
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> (b) before the defendant has taken any fresh step after becoming aware of the irregularity (see Order 2 r. 2(i) of the Rules of the High Court 1980).

Therefore, delay – also crucial in *Ban Huat Seng Co. Ltd v. Lee Poh Soo* [1967] 1 MLJ 145, where Ismail Khan J refused to set aside a default judgment, even though it was alleged that the agreement was null and void, as the defendant had been guilty of latches and his conduct had not been *bona*

fide – militates against the right *ex debito justitiae*, even though (i) it has been said that there is no rigid rule that an applicant must satisfy the court that there is a reasonable explanation for the delay (see *Fira Development Sdn. Bhd. v. Goldwin Sdn. Bhd.* [1989] 1 MLJ 40), and, (ii) the court in a fit case may disregard lapse of time (see *Fira Development (supra)* and *United Oriental Assurance Sdn. Bhd. v. Ng King See* [1987] 2 MLJ 264).

Prima facie, the delay in the instant case – almost 11 years to file this application – is [al]most contemptible. Yet, there was no explanation forthcoming from ... [al]most ... delay. Just this arrant attempt to reopen that which is final and binding. Just this abuse of the process of the court (*Stephenson v. Garnett* [1898] 1 QBD 677). This must be the case, even if the order for sale dated 22 September 1986 could be set aside *ex debito justitiae*, to refuse relief to this criminally indolent defendant. This cannot be the case, for that will be totally iniquitous, to condemn the plaintiff for any *faux pas*. Accordingly, the defendant's application (encl. 77) is dismissed with costs.

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